

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

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IN RE MERRILL LYNCH & CO., INC.	:	Master File No.
SECURITIES, DERIVATIVE AND	:	07cv9633 (LBS)(AJP)(DFE)
ERISA LITIGATION	:	
	:	MDL No. 1933
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This Document Relates To:  
Securities Actions

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**NOTICE OF MOTION OF PLAINTIFFS TO STRIKE EXTRINSIC DOCUMENTS  
AND CERTAIN ARGUMENTS MADE BY THE MERRILL DEFENDANTS AND  
DEFENDANTS EDWARDS, O'NEAL, FAKAHANY AND FLEMING IN THEIR  
MOTIONS TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION  
COMPLAINT**

PLEASE TAKE NOTICE that, based upon the Consolidated Amended Class Action Complaint ("Complaint"), the Memorandum of Law in Support of Plaintiffs' Motion to Strike Extrinsic Documents And Certain Arguments Made By the Merrill Defendants And Defendants Edwards, O'Neal, Fakahany And Fleming In Their Motions To Dismiss The Consolidated Amended Class Action Complaint, and all prior papers and proceedings herein, the Court-appointed Lead Plaintiff the State Teachers Retirement System of Ohio ("Lead Plaintiff") and plaintiff Gary Kosseff (together, "Plaintiffs") will move this Court, before the Honorable Leonard B. Sand, at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, on a date and at a time designated by the Court, for entry of an order: a) striking certain documents referenced in the motions to dismiss of Defendants Merrill Lynch & Co., Inc., Merrill Lynch Capital Trust I, Merrill Lynch Capital Trust II, Merrill Lynch

Capital Trust III, Merrill Lynch, Pierce, Fenner & Smith Incorporated (collectively, “Merrill Defendants”), Jeffrey N. Edwards, Stanley O’Neal, Ahmass L. Fakahany and Gregory J. Fleming (collectively, with the Merrill Defendants, hereinafter referred to as “Defendants”) as listed hereafter and; b) argument based thereon as shown in the highlighted memoranda of law which are attached to the Declaration of Robert N. Kaplan sworn to September 19, 2008 in support of this motion; and c) for such other and further relief as this Court may deem just and proper.

Specifically, Plaintiffs seek to strike the following documents:

1. The following exhibits to the Declaration of Jay B. Kasner In Support of the Merrill Defendants’ Motions to Dismiss The Consolidated Amended Complaints, sworn to July 18, 2008. (“Kasner Declaration”).<sup>1</sup>

- Exhibits A (textbook), B (article), C (article), D (textbook), E (statement), F (textbook), G (editorial opinion), H (editorial opinion), I (article), J (article), K (article), L (article), O (article), Q (non-defendant stock data), R (non-defendant stock data), S (non-defendant stock data), T (non-defendant stock data), U (non-defendant stock data) and SS (uncited corporate document).

2. The following extrinsic documents referenced in the memoranda of law in support of Defendants’ motions to dismiss the Complaint.

- Testimony of Ben S. Bernanke before the Joint Economic Committee, U. S. Congress (Mar. 28, 2007), cited in Merrill MTD at 3.
- International Monetary Fund, Global Financial Stability Report (Apr. 2007), *Id.* at 3, 22.

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<sup>1</sup> Plaintiffs also move to strike Exhibit E (Statement of John Finnegan before the House Committee on Oversight and Government Reform, Mar. 7, 2008), Exhibit K (Yalman Onaran and Jody Shenn, *Bear Stearns Turns to Marano for \$1.6 Billion Bailout*, Bloomberg, June 27, 2007) and Exhibit SS (Merrill Lynch Restated Certificate of Incorporation dated May 3, 2001) attached to the Kasner Declaration, which are not cited by defendants in their motions to dismiss relative to the Complaint but should not be considered by this Court with respect to defendants’ motions to dismiss the Complaint.

- International Monetary Fund, Global Financial Stability Report (Apr. 2008), *Id.* at 19, 65.
- John C. Dugan, Controller of the Currency, Remarks before the Global Association of Risk Professionals (Feb. 27, 2008), *Id.* at 4.
- Citations to Kevin M. LaCroix, *The D&O Diary*, regarding the number of subprime related securities, derivative and ERISA lawsuits, *Id.* at 4 n.7.
- Christopher Swann, *IMF Says Financial Losses May Swell to \$945 Billion (Update 2)*, Bloomberg, (Apr. 8, 2008), *Id.* at 7.
- Floyd Norris, *It's a Crisis and Ideas are Scarce*, N.Y. Times, (Apr.11, 2008), *Id.*, Edwards MTD at 7.
- U.S. Sec. & Exch. Comm'n, Consolidated Supervision of Broker-Dealer Holding Companies: Program Overview and Assessment Criteria (Apr 16, 2007), Merrill MTD at 18 n.10 and at 40.
- Jennifer E. Bethel et al., *Law and Economic Issues in Subprime Litigation* (Mar. 2008) (Discussion Paper, Harvard, John M. Olin Center for Law, Econ. & Bus.), Merrill MTD at 18, 19, 46, Edwards MTD at 14.
- All references made by defendants to news and SEC filings of companies other than Merrill, Merrill MTD at 21 n.11 and at 27-28 nn.13-15.
- Testimony of Ben S. Bernanke, Outlook of the U.S. Economy: Hearing before the Joint Econ. Comm., 110th Congress (2006), *Id.* at 22.
- Institute of International Finance ("IIF"), Final Report of the IIF Comm. on Market Best Practices (July 2008), *Id.* at 25.
- "Don't Mark to Market," *Economist*, (March 6, 2008), *Id.* at 54.
- Gregory Zuckerman, et al., Impact of Mortgage Crisis Spreads, Wall St. J., (Aug. 10, 2007), Fakahany MTD at 16, A1.
- Meg Fletcher, *Trends: Subprime Fallout Could Cost Billions*, Bus. Ins., (April 21, 2008), Edwards MTD at 6.
- Doug Alexander, *Greenspan Says Worst of U.S. Housing Slowdown Is Over*, Bloomberg.com, (Feb. 14, 2007), *Id.* at 7.
- Reuters, *Housing Woes Not Affecting Economy: Paulson*, (Mar. 13, 2007), *Id.*

- Edmund L. Andrews, *Treasury Chief Moves to Stabilize Markets*, N.Y. Times, (Oct. 16, 2007), *Id.*
- Joellen Perry, *Subprime Index is Overstating Losses, BIS Says*, Wall St. J., (June 9, 2008), *Id.* at 15, C2.
- Krishna Guha and Gillian Tett, *Last Year's Model: Stricken U.S. Homeowners Confound Predictions*, Fin. Times, (Feb. 1, 2008), *Id.* at 18.

their opposition to the defendants' motions.

Dated: September 19, 2008

Respectfully submitted,

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